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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GREENWOOD TRUST COMPANY,
Petitioner,

v.

JAMES HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Supreme Court Rule 15.8, Petitioner Greenwood Trust Company ("Greenwood") submits this Supplemental Brief to apprise the Court of a new decision rendered by the Colorado Supreme Court concerning the issue raised in Greenwood's Petition for a Writ of Certiorari.

On December 18, 1995, the same day that Greenwood filed its Petition in this Court, the Colorado Supreme Court unanimously held that flat credit card late charges assessed by Greenwood are "interest" under Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d. *Stoorman v. Greenwood Trust Co.*, No. 94SC382 (Colo. Dec. 18, 1995) (attached hereto). The same interpretation of Section 27 of

the FDIA has been reached in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993), and *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal. Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal. Rptr.2d 748 (Cal. 1995), *petition for cert. filed*, No. 95-951 (U.S. Dec. 18, 1995).

However, as discussed previously in Greenwood's Petition for Certiorari, the New Jersey Supreme Court ruled 4-3 in this case that Greenwood's flat credit card late charges are not "interest" under Section 27 of the FDIA.

There is a direct conflict in the courts below concerning Section 27 of the FDIA that can be resolved only by this Court. For national credit card lenders such as Greenwood the conflict creates tremendous uncertainty and disruption; indeed, as matters now stand, Greenwood's exportation of late fees has been held permissible under Section 27 of the FDIA by the First Circuit and Colorado Supreme Court, but declared illegal by the New Jersey Supreme Court. These conflicting rulings on an issue of tremendous economic ramifications warrant review by this Court.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO
NO. 94SC382

DECEMBER 18, 1995

SAMUEL J. STOORMAN, on behalf of himself and all others similarly situated, *Petitioner,*

v.

GREENWOOD TRUST COMPANY, *Respondent.*

Certiorari to the Colorado Court of Appeals

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JUDGMENT AFFIRMED

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JUSTICE MULLARKEY delivered the Opinion of the Court.
JUSTICE SCOTT does not participate.

We granted certiorari to review the court of appeals' decision in *Stoorman v. Greenwood Trust Co.*, 888 P.2d 289 (Colo. 1994). The court of appeals held that section 521 of the Depository Institutions Deregulation and Monetary Control Act (DIDA), 12 U.S.C. section 1831d(a) (1988), preempted section 5-3-203(5)(a) of the Colorado Uniform Consumer Credit Code (UCCC), section 5-3-203(5)(a), 2 C.R.S. (1992), thereby allowing a federally-insured, state-chartered bank located in Delaware to a charge a ten dollar late payment fee in addition to a finance charge to the credit card accounts of its Colorado customers. We affirm the judgment of the court of appeals, but we base our decision on different grounds.

I.

The respondent, Greenwood Trust Company (Greenwood), issues the Discover credit card and is a federally-insured, state-chartered bank located in Delaware. The petition, Samuel J. Stoorman (Stoorman), is a Colorado resident who became a Discover credit card member. When Stoorman failed to make a minimum monthly payment on his Discover credit card account, Greenwood assessed a ten dollar late payment fee to Stoorman's card account.

Stoorman initiated this class action, on behalf of himself and all others similarly situated, alleging that Greenwood violated section 5-3-203(5)(a) of the UCCC by charging a late payment fee in addition to a finance charge to his Discover credit card account. The district court grated Greenwood's motion for summary judgment, holding that section 521 of the DIDA preempts the Colorado consumer protection law. The court of appeals affirmed the dismissal, and we granted certiorari. We conclude that, as a matter of federal law, the ten dollar late payment fee imposed on Stoorman's Discover credit card account is a form of "interest" under section 521 of DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

II.

As a federally-insured, state-chartered bank, Greenwood is governed by the DIDA. 12 U.S.C. § 1831d(a). Congress enacted the DIDA in 1980 in response to economic conditions affecting the banking industry. *Hill v. Chemical Bank,* 799 F. Supp. 948 , 951 (D. Minn. 1992). In 1979, the Federal Reserve rate rose sharply as a result of the unprecedented crisis of simultaneous recession and inflation. The increase in the Federal Reserve rate caused national banks to gain a competitive advantage over state banks in states with lower interest rate ceilings. The DIDA was enacted to create parity between national and state banks. *Id.* Section 521 of the DIDA, 12 U.S.C. section 1831d(a), provides:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates, such State bank[s] . . . may, notwithholding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any note, bill of exchange, or other evidence of debt, interest at the rate . . . allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 1831d(a) (1988). Congress incorporated the language of section 85 of the National Bank Act (NBA), 12 U.S.C. section 85, which governs national banks, into section 521 of the DIDA. *Greenwood Trust Co. v. Massachusetts,* 971 F.2d 818, 825 (1st Cir. 1992), *cert. denied,* 113 S. Ct. 974 (1933). Section 85 of the NBA provides:

> Any, association [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 85 (1982).

Neither the NBA nor the DIDA defines the term "interest" or "interest at the rate." Generally, similar language should be interpreted in the same manner, unless the context requires different interpretation. *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). Moreover, Congress is presumed to be

aware of judicial interpretations of statutory language when it intentionally incorporates the language of one statute into another statute. *Id.*

In *Copeland v. MBNA Am. Bank, N.A.* No. 94SC409 (Colo. Nov. 20, 1995), we examined the definition of the term "interest" in section 85 of the NBA. In *Copeland,* we held that, as a matter of federal law, late payment fees are included as a form of "interest" under section 85 of the NBA, U.S.C. section 85 (1982). Thus, federal law authorized a national bank located in Delaware to charge Colorado customers a fifteen dollar late payment fee as allowed under Delaware law.

In this case, we must define the term "interest" in section 521 of the DIDA. We are persuaded for several reasons that late payment fees are a form of "interest" under section 521 of the DIDA. First, because section 521 of the DIDA incorporates its language from section 85 of the NBA, the statutory language should be given the same interpretation. Moreover, the Federal Deposit Insurance Corporation (FDIC), the government agency charged with administering the DIDA, has interpreted the term "interest" in section 521 of the DIDA as including late payment fees charged by federally-insured, state-chartered banks. *See* 12 C.F.R. § 7.7310(a). Finally, the majority of decisions examining the definition of the term interest in section 521 of the DIDA have held that late payment fees are included as a form of interest. *See Greenwood,* 971 F.2d at 818; *Ament v. PNC Nat. Bank,* 849 F. Supp. 1015 (W.D. Pa. 1944); *Hill,* 799 F. Supp. at 948. *Compare with Hunter v. Greenwood Trust Co.,* No. A-103-94 (N.J. Nov. 28, 1995); *Gadon v. The Chase Manhattan Bank,* 653 A.2d 697 (Pa. Super. 1995).

Therefore, we conclude, that, as a matter of federal law, late payment fees are included as a form of "interest" under section 521 of the DIDA. Because Greenwood is a federally-insured, state-chartered bank located in Delaware, and Delaware law permits the imposition of a late payment fee, Greenwood can charge Stoorman a ten dollar late payment fee despite the fact that a Colorado consumer protection law prohibited such fees.

Accordingly, we affirm the judgment of the court of appeals.

JUSTICE SCOTT does not participate.